No. 83-851

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

SOUTH STREET SEAPORT MUSEUM,
as Owner of the Bark PEKING,

Petitioner,

—v.—

CRAIG MCCARTHY,

Respondent,

—and—

THE STATE INSURANCE FUND and NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY,

Respondents.

PETITIONER'S REPLY BRIEF

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STATEMENT

Petitioner submits this Reply Brief because Respondent in his Brief in Opposition seems largely to have lost sight of the issues presented in the Petition—until at least the very end when he acknowledges (p. 8)

> "The respondent does not at all mean to suggest that this is an unimportant case, a petition unworthy of this Court's attention."

Respondent's arguments which are relevant to the pertinent issues stress the decision in *The C.H. NORTHAM*, 181 F. 983 (Dist. Ct. Mass. 1909) which, if it ever was, is no longer

authoritative as to what qualifies as a "vessel" for purposes of limitation of liability.

Reemploying the same reasoning to make the *a fortiori* argument that if C.H. NORTHAM were a vessel then certainly PEKING must be, Respondent then urges that since one dismantling such a vessel would be entitled to sue his employer/shipowner under the LHWCA, Respondent, painting such a vessel, should certainly have the same opportunity. As will be seen, the argument collapses in the face of the language and history of 33 U.S.C. § 905(b).

THE NON-ISSUES

1. Respondent dedicates a not insubstantial portion of his Brief to a recitation of what his claim on the merits may be. Presuming he is permitted to sue Petitioner for "negligence of a vessel" under § 905(b) of the LHWCA, the merits of whatever cause of action Respondent may have are not before this Court nor have they formed any part of the issues resolved by the lower courts. Consequently, Petitioner, although having an altogether different version of the circumstances of Respondent's claim, will not be drawn into such a discussion[1] at this stage.

2. Any issues as to the kind and extent of Respondent's injuries as set forth in his Brief are also irrelevant to the issues now presented to this Court with respect to the status of PEKING. Petitioner will therefore exercise the same restraint as set forth in 1 *supra* except a) to agree, as it has throughout, that Respondent was indeed injured at the time and place alleged, and b), in order to rebut the misleading inference of continuing disability raised (p. 8) in Respondent's Brief, to note the language of the first opinion of the Court of Appeals (Petition p. 19a) 676 F.2d 42, 44 (1982) that Respondent,

1 Petitioner's forbearance is also applicable to the affidavit contained in Respondent's appendix which, to the extent it may be relevant at all, is concerned with the merits of Respondent's claim.

admittedly injured on December 12, 1979, "returned to work on March 13, 1980".

3. To the extent that Respondent may be suggesting (p. 8) to the Court that he is remediless for his injuries, Petitioner refers again to the first opinion of the Court of Appeals (Petition p. 19a) 676 F.2d 42, 44, where, in footnote 4, the Court observed that Respondent "applied for and received benefits under the New York Workers' Compensation Law." Petitioner has also acknowledged (Petition p. 7) that following this Court's decision in the *Perini* case, Respondent is entitled to benefits under the LHWCA rather than the New York Act.

Respondent, The State Insurance Fund, in its Brief (p. 9) before this Court on the first petition (October Term 1982, No. 82-53), as well as in its answer to the third party complaint herein, has fully accepted its responsibility as workmen's compensation insurer for Petitioner whether under the New York State Act or the LHWCA. Respondent is therefore as well protected as the vast majority of employees in the United States who, when injured on their employer's premises, may obtain workmen's compensation benefits but may not sue their employer for third party damages. Both insurance company Respondents have, however, disclaimed coverage under their policies with Petitioner for any status of Petitioner as a "vessel owner".

4. Because the Amici Curiae note the cost burdens to maritime museums of not only paying workmen's compensation benefits but also third party damages if their historic ships are deemed vessels under § 905(b) of the LHWCA, Respondent maintains that they have invoked the doctrine of charitable immunity. Having erected this shaky edifice, Respondent then proceeds with its demolition. What the Amici Curiae have urged however is nothing more than what this Court recognized in *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74 (1980), namely that the 1972 amendments to the LHWCA intended to reduce litigation to insure that employers have

sufficient funds to pay the additional compensation rate—all as more fully discussed in the Petition pp. 10-13.

5. On page 8 of his Brief and as his finishing thrust or purported coup-de-grace, Respondent mounts a "deep pockets" argument by listing some of the sponsors and subscribers of the National Maritime Historical Society. Presumably space limitations forbade listing all 7,500 members mentioned by this Society on page 1 of the Amici Brief which also notes its fund raising efforts and the contributions of money and services by diverse organizations. While Respondent's thrust may have a certain jury appeal—although even juries appreciate a lighter touch—its employment before this Court would seem to fall short of the appropriate.

THE ISSUE

The issue here as stated more in detail in the Petition is essentially whether or not PEKING is a vessel within the meaning of § 905(b) of the LHWCA. While the Court of Appeals has reached differing conclusions as to the status of PEKING, there has, remarkably, been no controversy over the facts as to PEKING through one District Court and two Court of Appeals opinions. Nor does Respondent raise any factual question of substance as to PEKING in his Brief in Opposition. Respondent, however, does urge two arguments in support of his thesis that PEKING is a vessel. These are without foundation, respectively, in case law and under the LHWCA.

1. Respondent cites *The C.H. NORTHAM*, 181 F. 983 (1909) (Dist. Ct. Mass. 1909) for the proposition that a steamer which had been taken ashore for dismantling, which had her mast and engines removed and which in the course of a storm went adrift and caused damage without the owner's knowledge was a vessel for purposes of limitation of liability. The argument goes on to assert that if The C.H. NORTHAM was a

vessel then PEKING[2] must be. Overlooked are a) The C.H. NORTHAM was not being qualified as a "vessel" under § 905(b) of the LHWCA and, more importantly, b) whatever validity the decision had in 1909 was effectively overruled in 1926 by this Court's decision in *Evansville & Bowling Green Packet Company v. Chero Cola Bottling Company*, 271 U.S. 19. This Court, employing the same statutory definition of a vessel used by Respondent, denied limitation, holding that a wharfboat, "not subject to government inspection" (p. 2), but capable of being towed was not (p. 22) "practically capable of being used as a means of transportation." Interestingly enough, The *C.H. NORTHAM, supra*, was cited in the *Evansville* case on two occasions in the briefs of unsuccessful appellant's counsel, 70 L. Ed. 805, 806. Moreover, this Court noted the philosophic purpose of the limitation of liability rule (p. 21) "to promote the building of ships, to encourage the business of navigation . . ."—concepts antithetical to the demolition of vessels.

2. Respondent presses the argument (p. 3) that because Section 902(3) includes within the coverage of the LHWCA not only ship repairmen but ship-breakers, and because the latter would be involved only in working on ships no longer in navigation, an anomalous result would obtain under Petitioner's argument whereby Respondent, a ship repairman, would be deprived of his § 905(b) remedy whereas a ship-breaker "would have an undeniable claim for relief against South Street" (p. 4).

What is patently wrong with this argument, apart from begging the question, becomes evident when we examine the second and third sentences of § 905(b). Unlike § 902(3), which includes ship-breakers for purposes of compensation coverage, the language of § 905(b), in qualifying the negligence cause of action for those who may sue a vessel, makes no mention of those engaged in ship-breaking activities. Nor does the House

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2 Inadvertently described (p. 6) as the vessel in the authority cited.

Report[3] cited by this Court in *Jones & Laughlin Steel Corporation v. Pfeifer*, ___ U.S. ___, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983). It may be assumed that this Congressional omission was advised, for as Respondent says, (p. 3) ship-breakers "manifestly never are aboard ships which have anything but a residual capacity to be used as a means of transportation" and, perforce, they do not work aboard vessels which are actively in service.

CONCLUSION

Respondent's reasons for opposing the Petition are insubstantial. Indeed he acknowledges the importance of the issue. It is respectfully submitted that for all the reasons stated in the Petition a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals of the Second Circuit entered on August 23, 1983, that the foregoing be reversed and that Respondent be referred to the not ungenerous workmen's compensation benefits available to him under the LHWCA, as described in this Court's decisions in *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74 (1980) and *Rodriguez v. Compass Shipping Co., Ltd.*, 451 U.S. 596 (1981).

Respectfully submitted,

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3 H.R. Rep. No. 92-1441, 92d Cong. 2d Sess. reprinted in (1972) U.S. Code Cong. & Admin. News 4705.

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